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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 616

JUSTUS S. WARDELL, Receiver, District National Bank of Washington,

Petitioner,

vs.

DISTRICT OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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DISTRICT OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Justus S. Wardell, as Receiver of the District National Bank of Washington, an insolvent national banking association formerly doing business in the District of Columbia, by direction of the Comptroller of the Currency of the United States, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia rendered in the above captioned cause on June 16, 1941 (R. 38).

I.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered June 16, 1941. The jurisdiction of this Court to review this cause by writ of certiorari is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347(a)).

II.

Opinions of the Courts Below.

The opinion of the District Court of the United States for the District of Columbia is reported in 32 Fed. Supp. 769, and appears in the record at p. 12.

The opinion of the United States Court of Appeals for the District of Columbia is not yet reported, but appears in the record at p. 35.

III.

Statement of the Case.

Pursuant to the provisions of the District of Columbia Revenue Act of 1937, and the amendatory provisions enacted in 1938, petitioner reported gross receipts of rentals from the operation of certain properties owned by the bank at the time of its suspension, and taken over by petitioner among the assets of the receivership.

The 1937 Act imposed a tax, determined by gross receipts for the calendar year 1936, for "the privilege of engaging in business" in the District of Columbia upon "each person so engaged". The term "business" was defined by the Act as including "the carrying on or exercising for gain or economic benefit * * * any trade, business, profession, vocation, or commercial activity", and the term

"person" was defined as including a "receiver". The 1938 Act imposed a similar tax on gross receipts for the calendar year 1937, and was amended to include as "business" the "rental of real estate and rental of real and personal property * * *".

Each Act provides for penalties for delinquency in the filing of the return and payment of the tax. Petitioner derived from gross receipts during each taxable year net rentals exceeding the taxes, interest and penalties claimed.

Respondent brought this action to recover taxes, interest and penalties alleged to be due under the taxing Acts in question, asserting that petitioner, by reason of collecting rentals from the properties of the receivership, was engaging in business during the two taxable years, and was, therefore, liable for the taxes, interest and penalties claimed.

Petitioner admitted collecting the rentals from the receivership properties, and receiving a net profit therefrom in excess of the amounts claimed, and the existence of the taxing Acts in question. Petitioner denied liability however, asserting that the taxing Acts did not apply to him as receiver of an insolvent national bank, because he was not engaged in business in the District of Columbia as defined by the Acts, and because under the provisions of the Act of Congress, known as the insolvent bank tax abatement statute (U. S. C., Title 12, Sec. 570), the tax is abated, since the payment of such tax would diminish the assets of the insolvent bank necessary for full payment of all its depositors (R. 27).

In the District Court a motion by petitioner for summary judgment was granted, the action was dismissed, and the taxes, interest and penalties claimed in the complaint were abated (R. 30). From this judgment an appeal was taken to the United States Court of Appeals for the District of Columbia, which ~~could~~ reversed the District Court (R. 38).

IV.

Statutes Involved.

Title VI of District of Columbia Revenue Act of 1937 (50 Stat. 688; D. C. Code 1929, Supp. III, Title 20, Sec. 970).[1]

Act of May 16, 1938, Amending D. C. Revenue Act of 1937 (52 Stat. 363; D. C. Code 1929, Supp. IV, Title 20, Sec. 970).

Act of Mar. 3, 1881, 21 Stat. 460, c. 134 (D. C. Code 1929, Title 20, Sec. 628).

Sec. 4 of Act of June 11, 1878, as amended, 20 Stat. 105 (D. C. Code 1929, Title 20, Sec. 634).

Sec. 3 of Act of July 1, 1882, as amended, 22 Stat. 144 (D. C. Code 1929, Title 20, Sec. 635).

U. S. C., Title 12, Sec. 570 (Sec. 22 of the Act of Mar. 1, 1879, 20 Stat. 351).

U. S. C., Title 12, Sec. 192 (Sec. 5234 of the Revised Statutes).

U. S. C., Title 12, Sec. 194 (Sec. 5236 of the Revised Statutes).

U. S. C., Title 12, Sec. 548 (Sec. 5219 of the Revised Statutes).

Section 6 of Act of July 1, 1902, as amended (32 Stat. 619; D. C. Code 1929, Supp. V, Title 20, Sec. 760).

V.

Questions Presented.

1. Whether the taxes, interest and penalties claimed in the suit are abated under the provisions of U. S. C. Title 12, Sec. 570 when the payment of such sums would diminish

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[1] Title VI of the District of Columbia Revenue Act of 1937, 50 Stat. 688, as amended 52 Stat. 363, expired June 30, 1939, D. C. Code Supp. V, Title 20, Sec. 970 *et seq.* See Sec. 16, 52 Stat. 369.

the assets of the bank necessary for the full payment of depositors.

2. Whether the provisions of U. S. C., Title 12, Sec. 570 operate to exempt insolvent national banks in receivership from Federal taxation only.

3. Whether a receiver of an insolvent national bank, collecting, in the course of liquidation, rentals from receivership properties formerly owned by the bank, is engaging in business in the District of Columbia.

4. Whether operating real estate and collecting rentals as an incident to liquidating properties formerly owned by the bank, and holding them until a sale can be made advantageous to creditors, subjects the receiver and the assets under his control to payment of a business privilege tax.

5. Whether the provisions of Title 20, Sec. 760, D. C. Code, 1929, limit the District of Columbia in its authority to tax personal property of national banks in the District solely to the tax on gross earnings or gross receipts provided by said statute.

6. Whether penalties can be assessed against a receiver of an insolvent national bank who in good faith resists payment of a tax which he considers inapplicable to the receivership.

VI.

Specification of Errors.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the taxes, interest and penalties provided by the District of Columbia Revenue Acts in question are not abated by the provisions of U. S. C., Title 12, Sec. 570 when the payment of such sums would diminish the

assets of the insolvent national bank necessary for the full payment of depositors.

2. In holding that the provisions of U. S. C., Title 12, Sec. 570 operate to exempt insolvent national banks in receivership from Federal taxation only.

3. In holding in effect that petitioner, as receiver of an insolvent national bank, was engaging in business in the District of Columbia when, in the course of liquidating the assets of the bank, petitioner collected rentals from properties owned by the bank.

4. In holding in effect that by operating real estate and collecting rentals as an incident to liquidating properties owned by the bank, the receiver and the receivership assets are subjected to payment of a tax for the privilege of doing business.

5. In not holding that Title 20, Sec. 760, D. C. Code 1929, providing for a tax on national banks in the District on their gross earnings or gross receipts, precludes other taxes on their personal property.

6. In holding that tax penalties can be assessed against a receiver of an insolvent national bank.

VII.

Reasons Relied On for Allowance of the Writ.

1. The United States Court of Appeals for the District of Columbia has decided in this case a question of general importance, which has not been, but should be settled by this Court.

2. The question is of great importance to the Comptroller of the Currency in liquidating banks, State and national, becoming insolvent or now in liquidation in the District of Columbia, because the decision of the Court of Appeals

is now being urged as a precedent for the collection of other local taxes from these insolvent institutions; also, similar tax claims against other bank receiverships in the District of Columbia are to be disposed of under the final decision in this case.

3. The question is of great importance in liquidating national banks becoming insolvent or now in liquidation in the several States, because the decision of the Court of Appeals may become a precedent for the collection of local State taxes from these insolvent institutions.

4. The question is of great importance because it affects vitally the interests of bank depositors who constitute a numerous class.

5. The Court of Appeals has not given proper effect to applicable decisions of this Court.

6. The decision of the Court of Appeals appears to be in conflict with its own decisions and with the decisions of other Circuit Courts of Appeal.

VIII.

Discussion.

(a) *U. S. C. Title 12, Sec. 570, exempted petitioner from payment of the taxes, interest and penalties claimed by respondent.*

This statute provides in part:

> "(a) Whenever and after any bank or trust company, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States on account of such bank, or trust company, which shall diminish the assets thereof necessary for the full pay-

> ment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall appear to him, is authorized to remit so much of the said tax against any such insolvent banks and trust companies organized under the State law as shall be found to affect the claims of their depositors."

It is shown, and not contested, that this bank "ceased to do business by reason of insolvency", and that the payment of the amounts claimed "will diminish the assets necessary for the full payment of all its depositors" (R. 9, 27). It was the intention of Congress in enacting this statute to protect the depositors from having the assets necessary for their full payment reduced by the payment of these taxes, which add nothing to the insolvent estate but reduce their *pro tanto* distributive share guaranteed by the National Bank Act, U. S. C., Title 12, Sec. 194. The legislative history behind enactment of the statute proves this.[2]

In *Johnston, Receiver,* v. *U. S.* (1881), 17 Court of Claims 157, the court, in interpreting this statute, said at page 172:

> "The act of March 3, 1879, now under consideration, was passed for the undoubted purpose of relieving depositors in national banks from the payment of certain taxes, not assessed upon them, but upon the banks of which they are only customers; taxes which, under the preexisting law, they would indirectly be obliged to pay when a bank is so insolvent that all its capital is gone and it has nothing left with which to pay taxes, except the money of its depositors."

See also to the same effect:

Jackson, Receiver, v. *U. S.* (1885), 20 Ct. Claims, 298, 304;

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[2] Congressional Record, 45th Congress, 2nd Session pp. 3627, 4696, 4758, 3rd Session pp. 1918, 1969.

Hazen v. *Hardee*, 64 App. D. C. 346, 78 F. (2d) 230, 232;
United States v. *Sterling* (C. C. A. 4th, 1939), 106 F. (2d) 178, 180;
United States v. *Power Company* (C. C. A. 4th, 1940), 108 F. (2d) 609, 610;
Valuation Service Co. v. *Commissioner* (1940), 41 B. T. A. 811, 815.

The National Bank Act should be given a liberal interpretation to protect depositors.

Korbly v. *Springfield Institution for Savings* (1917), 245 U. S. 330, 333;
Lawrence National Bank v. *Rice* (C. C. A. 10th, 1936), 83 F. (2d) 642, 644;
Grindley v. *First National Bank* (C. C. A. 6th, 1936), 87 F. (2d) 110, 112.

The court below held that the statute confers an exemption from Federal taxation only, and relied on *People* v. *Loughman* (C. C. A. 2nd, 1938), 100 F. (2d) 387. The cases are clearly distinguishable. The tax in the *Loughman* case was levied by the State of New York on the net income of the bank *before receivership*, as permitted by the National Bank Act (Section 5219 of the Rev. Stat., U. S. C. Title 12, Sec. 548). The statute (hereinafter discussed) fixes the limit of State power to tax national banks, and permits a tax on their net income as one of the four alternative forms of taxation permitted; hence Section 570 did not apply and the case is not in point. In the instant case the tax was levied against petitioner *after the bank's insolvency and closing*, and not under the District of Columbia Code section permitting taxation of national banks on gross receipts or gross earnings. (D. C. Code, 1929, Title 20, Sec. 760.)

The District of Columbia may suggest, in support of the foregoing position of the court below to the effect that said exemption statute of March 1, 1879, refers to Federal taxa-

tion only, that such construction is supported by the language of the statute which provides that:

> "no tax shall be assessed or collected, or paid *into the Treasury of the United States,* on account of such bank * * *". (Italics inserted.)

Without conceding the correctness of the narrow construction of the statute by the court below, it seems proper to point out, in response thereto, that the District of Columbia, as a municipal corporation, is an agency of the United States, and that taxes collected by the District of Columbia as a municipal corporation, *can be collected only by virtue of Federal statutes conferring such authority.* **Consequently, it follows that taxation levied by the District of Columbia is, in final analysis, Federal taxation and is within the literal scope of the abatement statute in that respect. This position of petitioner would seem further to be supported by the provisions of the Federal statutes (D. C. Code 1929, Title 20, c. 4, Secs. 628, 634, 635—Appendix, p. 25), to the effect that all moneys collected by the District of Columbia shall be paid into the Treasury of the United States, to be held subject to subsequent appropriation by Congress for payment of the expenses of the District of Columbia as a Federal agency.** For example, see District of Columbia Appropriation Act, 1941 (54 Stat. 307, c. 333, June 12, 1940).

It seems indisputable that the rents in question, when collected, became a part of the assets distributable *pro rata* to creditors, and that since the payment of the tax would decrease these assets, they are abated until the creditors have been paid in full.

The situation existing in the case of *Valuation Service Company, Petitioner,* v. *Commissioner of Internal Revenue* (1940), 41 B. T. A. 811, 815, would seem to apply, by anal-

ogy, to the situation in the instant case in so far as the purpose and intent of Congress in the enactment of the said Abatement Statute (U. S. C., Title 12, Sec. 570) is concerned. In that case the question was whether income derived by a subsidiary corporation of a State bank was subject to the provisions of Federal Income Tax Law, it appearing that the State bank was in liquidation, and the assets of the subsidiary corporation consisted of certain real estate holdings, the proceeds of liquidation of which accrued for the benefit of the creditors of the insolvent State bank. It was held, in effect, that substance rather than form should be considered, and that the bank and the subsidiary corporation should be considered "as parts of a single organization, all of whose assets are subject to the claims of the bank's depositors," and hence, that the income derived from the operations of the subsidiary corporation in the liquidation of the real estate, was not subject to Federal income taxation. The following extract from the opinion in that case (p. 815) dealing with the application of the abatement provisions of said Act of Congress of March 1, 1879, seems to be in point.

> "It is self-evident that the objective of the enactment in question, both in its original form and as amended, was to assist and benefit depositors of insolvent banks. As the Court of Claims says in *Johnston* v. *United States*, 17 Ct. Cls. 157, the provision 'was passed for the undoubted purpose of relieving depositors in national banks from the payment of certain taxes, not assessed upon them, but upon the banks of which they are only customers; taxes which, under the pre-existing law, they would indirectly be obliged to pay when a bank is so insolvent that all its capital is gone and it has nothing left with which to pay taxes, except the money of its depositors.' It is clear that the depositors are no more responsible for the present situation than they were for the tax deficiencies of the bank itself. They were not the organizers of the peti-

tioner, they had no voice in its management and no direct interest in its affairs. They are in danger, however, of being the innocent victims of circumstance. For, if respondent is successful in this proceeding, the entirely collateral element of the form of petitioner's organization as a separate corporation, instead of as the bank's real estate department, will result in denial to the depositors of that relief which it seems evident it was the purpose of Congress to afford; relief which they would have obtained without question in the absence of petitioner's intervening presence.

"In that view we can not avoid the conclusion that it will most nearly effectuate the evident legislative purpose to treat these taxes as being due only 'on account of such bank'; to treat petitioner and the bank as parts of a single organization, all of whose assets are subject to the claims of the bank's depositors, and whose unforgiven liabilities will inevitably diminish those assets; and so to apply the statute as to find that there is no deficiency in tax due from this petitioner under its terms."

A similar ruling was recently made by the United States Bureau of Internal Revenue concerning the Federal American National Bank and Trust Company, now in receivership in the District of Columbia. In that case, it appears that the Federal American National Bank and Trust Company was the owner of all of the stock of a subsidiary corporation—Rock Creek Park Estates, Inc. Substantially the entire assets of the subsidiary corporation consisted of real estate, and the question was whether the income resulting from the liquidation of said real estate by the subsidiary corporation was subject to the provisions of the Federal Income Tax Law. The receiver of the national bank, by his letter of December 28, 1939 (Appendix, p. 29), directed to the Internal Revenue Department, contended that inasmuch as the income of the subsidiary corporation accrued to the

national bank receivership for the benefit of its depositors and creditors, said income should not be subject to the Federal Income Tax Law, and should be permitted to be used entirely for the purpose of paying the depositors and other creditors of the national bank. The national bank had been placed in receivership at the time of the national banking crisis in 1933, and it will be observed from the letter of December 28, 1939, to the Internal Revenue Department, that the Collector of Internal Revenue had assessed income tax against the subsidiary corporation for the years 1936 and 1937, which, of course, was during the course of liquidation of the national bank by its receiver. In this respect, therefore, the situation is analogous to the situation in the instant case, inasmuch as the tax there sought was upon the operations of the national bank receivership, through the subsidiary corporation, just as in the instant case the tax levied by the District of Columbia is upon the operations of the national bank receivership.

The Bureau of Internal Revenue ruled:

> "Your contention that the corporation is exempt from income tax is conceded on behalf of the Commissioner of Internal Revenue."

and that a refund of the income taxes (levied, in effect, upon the national bank receivership) for the years 1936 and 1937 should be refunded. A copy of the ruling of the Bureau of Internal Revenue in said case will be found in the Appendix hereof, p. 32.

When U. S. C. Title 12, Sec. 570 is considered with U. S. C. Title 12, Secs. 192 and 194 and 548, these provisions of the National Bank Act clearly exempt the receiver of an insolvent national bank from payment of these taxes. Section 192 places exclusive control of the insolvent association in the hands of the Comptroller of the Currency and the

liquidation of its assets by a receiver who acts under his direction.

Cook County National Bank v. *United States* (1882), 107 U. S. 445, 448;

Easton v. *Iowa* (1903), 188 U. S. 220, 231;

Liberty National Bank v. *McIntosh* (C. C. A. 4th, 1927), 16 F. (2d) 906, 908;

Grindley v. *First National Bank of Detroit* (C. C. A. 6th, 1936), 87 F. (2d) 110, 112.

The effect of Section 194 is to make complete provision for the distribution *pro rata* of all funds derived from the liquidation of the assets of the association and requires the payment of all claims according to one rule of proportion applicable to all alike. *National Bank* v. *Colby* (1874), 21 Wall. 609, 613; *White* v. *Knox* (1884), 111 U. S. 784, 786.

If the tax claimed could be collected from this receiver, by the same reasoning any other similar tax operating generally in the District of Columbia would be collectible, which reasoning carried to a logical conclusion could make the receiver liable for an indefinite number of additional taxes. Such clearly was not the intent of Congress.

(b) *Petitioner was not engaging in business in the District of Columbia, and hence, was not taxable under the Business Privilege Taxing Acts in question.*

This bank, like many others similarly situated, was closed in March, 1933, and a receiver was appointed by the Comptroller of the Currency to liquidate its assets because of insolvency. All the assets of the bank, including its real estate, were taken over by the receiver for liquidation so that cash might be realized for *pro rata* distribution to creditors.

The business which the bank was empowered to do under its Articles of Association, such as receiving deposits and savings, lending moneys, *et cetera*, had ceased, so that the receiver was not engaging in that business. He was merely

liquidating the bank's assets to realize cash, the only distributable form to which they might be reduced for *pro rata* distribution in accordance with the National Bank Act (U. S. C. Title 12, Sec. 194) which makes *pro rata* distribution mandatory.

It so happened that the assets of the bank included real estate, which could not be sold advantageously at the time of depression. In these circumstances the receiver, acting for the best interests of the creditors, held the property until a favorable market might present itself. If in doing so he was required to collect rentals, that was not engaging in business, but was merely a necessary incident of liquidating the insolvent estate. The main object is not to conduct a real estate business for a profit, but to preserve the properties until they can be sold advantageously.

The receiver is the agent of the Comptroller of the Currency and is an officer of the United States charged with administering the affairs of the insolvent institution. *Auten* v. *U. S. National Bank,* (1899) 174 U. S. 125, 141, *Leonard* v. *Gage,* (C. C. A. 4th, 1938) 94 F. (2d) 19, 24. And the National Bank Act provides a complete and exclusive system whereby that receiver, acting under the direction of the Comptroller, shall liquidate the association. *Deitrick* v. *Greaney,* (1940) 309 U. S. 190, 194. When thus functioning, the receiver is not engaging in business, even though he holds stocks, bonds, real estate, or other like assets, and collects income in the form of dividends, interest or, as here, rentals.

In order to be engaging in business the person so engaging must contemplate as the primary object the reaping of a profit.

Sloan v. Commissioner of Internal Revenue, (C. C. A. 9th, 1933) 63 F. (2d) 666, 669;

Commissioner of Internal Revenue v. *Field,* (C. C. A. 2nd, 1933) 67 F. (2d) 876, 877;

Richards v. *Commissioner of Internal Revenue* (C. C. A. 9th, 1936) 81 F. (2d) 369, 372;
Sears v. *Hassett,* (C. C. A. 1st, 1940) 111 F. (2d) 961, 964;
Goddard v. *Chaffie,* (1861) 84 Mass. 395;
Beikler v. *Guenther,* (Iowa, 1903) 96 N. W. 895, 896;
Von Baumbach v. *Sargent Land Company,* (1917) 242 U. S. 503, 514-516.

When a corporation ceases to conduct the business for which it was organized and turns it over to another, the corporation is not engaged in business.

Public Service Ry. Co. v. *Herold,* (C. C. A. 3rd, 1916) 229 Fed. 902, 907;
Anderson v. *Morris & Essex R. R. Co.,* (C. C. A. 2nd, 1914) 216 Fed. 83, 91;
U. S. v. *Emery, Bird, Thayer Realty Co.,* (1915) 237 U. S. 28, 32.

The mere holding of real estate taken over from the bank and collecting rentals as an incident to such holding until the property can be sold advantageously, is not "engaging in business" or "carrying on or exercising for gain or economic benefit" a "business" from a legal standpoint, or within the meaning of the taxing statutes.

This Court has laid down the test of "engaging in business" in *Von Baumbach* v. *Sargent Land Company,* 242 U. S. 503, 516:

> "The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning *and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the pur-*

> *pose of continued efforts in the pursuit of profit and gain* and such activities as are essential to those purposes." (Emphasis ours.)

In *Flint* v. *Stone Tracy Company,* (1910) 220 U. S. 107, this Court held that a tax assessed upon the privilege of "carrying on or doing business" by a corporation applied to certain of the corporations held taxable because they were actually engaging in real estate and mining operations for a profit as allowed by their charters.

But in *Zonne* v. *Minneapolis Syndicate,* (1911) 220 U. S. 187 the question arose as to whether the same tax on the privilege of doing a corporate business could apply to a corporation originally organized for the purpose of owning and renting an office building, but which reorganized to hold title only and receive and distribute rentals. This Court held that the corporation was not engaged in doing business and was not taxable, and said at page 191:

> "The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of reorganization from any activity in respect to it. We are of opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909."

The rule of law in the *Zonne* case has been followed by the United States Court of Appeals for the District of Columbia in *Littlehales* v. *District of Columbia,* (App. D. C. 1940), 116 F. (2d) 297.

So a corporation is not engaged in business for purpose of the business privilege tax where its principal object and activities are preservation of the property, liquidation of the estate and distribution of the income.

McCoach v. *Minehill Railway Co.* (1913), 228 U. S. 295, 307;

U. S. v. *Emery* (1915), 237 U. S. 28, 32;

U. S. v. *Atlantic Coast Line* (C. C. A. 4th, 1938), 99 F. (2d) 6, 8;
Fidelity Bankers Trust Co. v. *Helvering* (App. D. C. 1940), 113 F. (2d) 14, 17;
Lyon Lumber Co. v. *Harrison* (C. C. A. 7th, 1940), 113 F. (2d) 443, 448;
Littlehales v. *District of Columbia* (D. C. App. 1940), 116 F. (2d) 297.

Viewed in the light of these rules and authorities, the receiver was not engaging in business and the business privilege taxing statute did not apply to petitioner.

(c) *The National Bank Act (U. S. C. Title 12, Sec. 548) furnishes the exclusive measure for the authority of a State or territory to tax national banks. Following this, the Act of July 1, 1902, as amended, Section 760, Title 20 D. C. Code 1929, describes the exclusive measure of the authority of the District of Columbia to tax national banks and the Acts here under consideration confer no additional power.*

U. S. C. Title 12, Sec. 548 provides in part as follows:

> " 'The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by the net income * * *.' 'The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, * * *.' "

This statute furnishes the exclusive rule of authority of a State to tax national banks. *Bank of California National Association* v. *Richardson* (1919), 248 U. S. 476, 483; *People etc.* v. *Goldfogle* (1922), 234 N. Y. 345, cert. denied 261 U. S. 620 and any tax not in conformity with this statute is invalid. *Owensboro Natl. Bank* v. *Owensboro* (1899),

173 U. S. 664, 669; *First National Bank of Gulfport* v. *Adams* (1922), 258 U. S. 362, 364.

It was the policy of Congress in enacting this statute to provide for a uniform system of taxing national banks throughout the territorial limits of the United States. *Domenech* v. *National City Bank of New York* (1935), 294 U. S. 199, 204. And the action applies to a State, territory and to the District of Columbia. *Talbott* v. *Silver Bow County* (1891), 139 U. S. 438, 443.

In line with this policy of allowing one tax and one tax only as a basis for taxing the personal property of a national bank, the Act of July 1, 1902 (Sec. 760, Title 20 D. C. Code 1929) provides that each national bank in the District of Columbia shall make a return to the Board of Personal Tax Appraisers of the amount of its gross earnings and shall pay 6% on such earnings and the amendment thereto of March 3, 1917 provided that this tax on gross earnings shall be in lieu of all other taxation on the personal property of the bank. It is clear that Congress, in enacting this statute applicable to the District of Columbia, intended that the policy of allowing one tax only, on personal property, just as in the States, should be followed.

Further, the District of Columbia Revenue Acts in question specifically provide (Sec. 6) that national banks which pay taxes upon gross receipts shall be exempt from taxation under these statutes. The appointment of a receiver by the Comptroller does not dissolve a corporation and the assets remain the property of the bank. *Chemical National Bank* v. *Hartford Deposit Co.* (1896), 161 U. S. 1, 9; *Wittnebel* v. *Loughman* (C. C. A. 2nd, 1935), 80 F. (2d) 222, 224. And where the taxing authority is without power to tax the national bank, it is likewise unable to tax the assets of the bank in the hands of the receiver. *Rosenblatt* v. *Johnston* (1881), 104 U. S. 462, 463; *Gully v. First*

National Bank of Meridian (C. C. A. 5th, 1936), 81 F. (2d) 502, 506. The District National Bank is in liquidation but its assets, under the control of petitioner, are still assets of the bank. The property of the receivership under the authorities above mentioned is exempt in the hands of the receiver from taxation to the same extent as it was before his appointment. It is our contention that Section 760 of Title 20 of the D. C. Code provides the sole measure of the authority of the District of Columbia to tax the assets in the hands of petitioner for distribution to creditors and that the District Revenue Acts of 1937 and 1938 confer no additional authority for such taxation.

IX.

Conclusion.

It is therefore respectfully submitted that this case is one of general importance which should be decided by this Court in order to settle the conflict in the question presented. It is urged that a Writ of Certiorari should be granted and that this Court should review and reverse the decision of the United States Court of Appeals of the District of Columbia.

Respectfully submitted,

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for Petitioner.

GEORGE P. BARSE,
JOHN F. ANDERSON,
LEE ROY STOVER,
Attorneys for the Comptroller of the Currency,
Of Counsel.

APPENDIX A.

U. S. C., Title 12, Sec. 192.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings. * * * (R. S. sec. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, sec. 339, 49 Stat. 721.)

U. S. C., Title 12, Sec. 194.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. Sec. 5236.)

U. S. C., Title 12, Sec. 548.

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from na-

tional banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R. S. Sec. 5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223.)

U. S. C., Title 12, Sec. 570.

(a) Whenever and after any bank or trust company, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States on account of such bank, or trust company, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall

be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall appear to him, is authorized to remit so much of the said tax against any such insolvent banks and trust companies organized under State law as shall be found to affect the claims of their depositors.

(b) Whenever any bank or trust company, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, has been released or discharged from its liability to its depositors for any part of their claims against it, and such depositors have accepted, in lieu thereof, a lien upon subsequent earnings of such bank or trust company, or claims against assets segregated by such bank or trust company or against assets transferred from it to an individual or corporate trustee or agent, no tax shall be assessed or collected, or paid into the Treasury of the United States on account of such bank, or trust company, such individual or corporate trustee or such agent, which shall diminish the assets thereof which are available for the payment of such depositor claims and which are necessary for the full payment thereof.

(c) Any such tax so collected shall be deemed to be erroneously collected, and shall be refunded subject to all provisions and limitations of law, so far as applicable, relating to the refunding of taxes, but tax so abated or refunded after the date of the enactment of the Revenue Act of 1938 shall be reassessed whenever it shall appear that payment of the tax will not diminish the assets as aforesaid. The running of the statute of limitations on the making of assessment and collection shall be suspended during, and for ninety days beyond, the period for which, pursuant to this section, assessment or collection may not be made, and a tax which has been abated may be reassessed and collected during the time within which, had there been no abatement, collection might have been made.

(d) This section shall not apply to any tax imposed by the Social Security Act. As amended May 28, 1938, c. 289, sec. 818, 52 Stat. 579.

Title 20, Sec. 628, Code of the District of Columbia, 1929.

Sec. 628. Collector of taxes; to collect all revenues.—The collector of taxes for said District shall collect all revenues of the District and deposit the amounts collected daily with the Treasurer of the United States. (Mar. 3, 1881, 21 Stat. 460, c. 134).

Title 20, Sec. 634, Code of the District of Columbia, 1929

Sec. 634. Disbursement of taxes and appropriations; vouchers; settlement of accounts.—

All taxes collected shall be paid into the Treasury of the United States, and the same, as well as the appropriations made by Congress for the expenses of the District of Columbia, shall be disbursed for the expenses of said District, on itemized vouchers, which shall have been audited and approved by the Auditor of the District of Columbia, certified by said commissioners, or a majority of them; and the accounts of said commissioners, and the tax collectors, and all other officers required to account, shall be settled and adjusted by the General Accounting Office. (June 11, 1878, 20 Stat. 105, c. 180, sec. 4; June 10, 1921, 42 Stat. 20, c. 18.)

Title 20, Sec. 635, Code of the District of Columbia, 1929.

Sec. 635. Same; requisition by commissioners; appropriations not to be exceeded; accounting.—

All moneys appropriated for the expenses of the government of the District of Columbia, together with all revenues of the District of Columbia from taxes or otherwise, shall be deposited in the Treasury of the United States, as required by the provisions of section 634 of this title, and shall be drawn therefrom only on requisition of the Commissioners of the District of Columbia, such requisition specifying the appropriation upon which the same is drawn; and in no case shall such appropriation be exceeded either in requisition or expenditure; and the accounts for all disbursements of the commissioners of said District, shall be made monthly to the General Accounting Office by the auditor of the District of Columbia, on vouchers certified by the commissioners, as required by law. (July 1, 1882, 22 Stat. 144 c. 263,

sec. 3; Mar. 3, 1883, 22 Stat. 470, c. 95, sec. 2; June 10, 1921, 42 Stat. 20, c. 18.)

District of Columbia Code 1929, Supp. III, Sec. 970.

Title VI—Tax on privilege of doing business.—Where used in this title—

(a) The term "person" includes any individual, firm, copartnership, joint adventure, association, corporation (domestic or foreign), trust, estate, receiver, or any other group or combination acting as a unit, but shall not include railroad or railroad express companies which report to and are subject to regulation by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act of 1887, as amended.

* * * * * * *

(d) The term "business" shall include the carrying on or exercising for gain or economic benefit, either direct or indirect, any trade, business, profession, vocation, or commercial activity in or on privately owned property and in or on property owned by the United States Government in the District of Columbia, not including, however, labor or services rendered by any individual as an employee for wages, salary, or commission.

(e) The term "gross receipts" means the gross receipts received from any business in the District of Columbia, including cash, credits, and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials, labor, or services or other costs, interest, or discount paid, or any other expenses whatsoever: *Provided,* That the "gross receipts" when used in connection with or in respect of financial transactions involving the sale of notes, stocks, bonds, and other securities, or the loan, collection, or advance of money, or the discounting of notes, bills, or other evidences of debt, shall be deemed to mean the gross interest, discount, commission, or other gross income earned by means of or resulting from said financial transactions: *Provided further,* That in connection with commission merchants, attorneys or

other agents, the term "gross receipts" shall be deemed to mean the gross amount of such commissions or gross fees received by them, and, as to stock and bond brokers, the term "gross receipts" shall be deemed to mean gross amount of commissions or gross fees received, the gross trading profit on securities bought and sold, and the gross interest income on marginal accounts from business done or arising in the District of Columbia: *Provided further*, that with respect to contractors the term "gross receipts" shall mean their total receipts less money paid by them to sub-contractors for work and labor performed and material furnished by such sub-contractors in connection with such work and labor.

* * * * * * *

Sec. 5. For the privilege of engaging in business in the District of Columbia, each person so engaged shall pay to the collector of taxes of the District of Columbia for the fiscal year 1937-1938 a tax equal to two-fifths of 1 per centum of the gross receipts in excess of $2,000 derived from such business for the calendar year 1936:

* * * * * * *

Sec. 6. National banks and all other incorporated banks and trust companies, street railroad, gas, electric lighting and telephone companies, companies incorporated or otherwise, who guarantee the fidelity of any individual or individuals, such as bonding companies, companies who furnish abstracts of titles, savings banks, and building and loan associations which pay taxes under existing laws of the District of Columbia upon gross receipts or gross earnings, and insurance companies which pay a tax upon premiums shall be exempt from the provisions of this title.

* * * * * * *

(Aug. 17, 1937, 50 Stat. 693, c. 690.)

Title 20, Sec. 970, Code of the District of Columbia, 1929, Supp. IV.

Sec. 970. Tax on privilege of doing business; definitions.—

* * * * * * *

(e) The term "business" shall include the carrying on or exercising for gain or economic benefit, either direct or indirect, any trade, business, profession, vocation, or commercial activity *including rental of real estate and rental of real and personal property, in any commerce whatsoever in the District,* in or on privately owned property and in or on property owned by the United States Government, [*in*] *or by* the District [of Columbia], not including, however, labor or services rendered by any individual as an employee for wages, salary, or commission. * * * (Aug. 17, 1937, 50 Stat. 688, c. 690, Title VI, Sec. 1; May 16, 1938, 52 Stat. 363, c. 223, Sec. 6 (a).)

Title 20, Sec. 760, Code of the District of Columbia, 1929, Supp. V.

Sec. 760. Same; banks, gas, electric lighting, and telephone companies.—

Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks and trust companies in the District of Columbia, through their presidents or cashiers, and all gas, electric lighting, and telephone companies, through their proper officers, shall make affidavit to the board of personal-tax appraisers on or before the 1st day of August each year as to the amount of its or their gross earnings *or gross receipts, as the case may be,* for the preceding year ending the 30th day of June, *and each national bank and all other incorporated banks and trust companies respectively shall pay to the collector of taxes of the District of Columbia per annum 6 per centum on such gross earnings,* and each gas company, electric lighting company, and telephone company shall pay to the collector of taxes of the District of Columbia per annum 4 per centum on such gross receipts, from the sale of public utility commodities and services within the District of Columbia. And in addition thereto the real estate owned by each national or other incorporated bank, and each trust, gas, electric-lighting, and telephone company in the District of Columbia shall be taxed as other real estate in said District: *Provided,* That street-railroad companies shall pay *3* per centum per annum on their gross receipts and other taxes as provided by *existing* law, and

insurance companies shall continue to pay the *2* per centum on premium receipts as provided by *existing law*. Each gas, electric-lighting, telephone and street railroad company shall pay, in addition to the tax herein mentioned, the corporate income tax imposed by sections 980-980pp of this title, and the personal property tax on merchandise stock in trade.

(b) This section shall not apply to gross earnings or gross receipts for any fiscal year ending the 30th day of June prior to the fiscal year ending June 30, 1940. Taxes shall be levied and collected for the fiscal years preceding the fiscal year ending June 30, 1940, under the section as if this amendment had not been enacted. (July 1, 1902, 32 Stat. 619, c. 1352, Sec. 6, par. 5; April 28, 1904, 33 Stat. 564, c. 1815, Sec. 2; July 26, 1939, 53 Stat. 1107, c. 367, Title IV, Sec. 2.) (Part in italics added by 1939 amendment.)

APPENDIX B.

Federal-American National Bank and Trust Company.
Washington, D. C.

December 28, 1939.

Treasury Department,
Internal Revenue Service,
Baltimore, Maryland.

GENTLEMEN:

Reference is made to your letter of December 2, 1939 addressed to the Rock Creek Park Estates, Inc., % The American Company, 807-15th Street, N. W., Washington, D. C., in which you enclosed a copy of a report of the examination of the Income Tax Returns for the years 1936 and 1937 in which is shown an income tax deficiency for the two years in the aggregate amount of $1,706.17.

It is my opinion that the Rock Creek Park Estates, Inc. is not subject to income tax assessment for the following reasons;

The entire capital structure of the Rock Creek Park Estates consists of 2,000 shares of common stock which is owned by this Receivership as an asset. The stock being acquired by this trust through the Edson W. Briggs Com-

pany, which company was the owner of approximately 1,300,000 square feet of land located in this city. The property being subject to a first trust of $155,000.00 which was owned by the American Company and the second deed of trust in the amount of $90,000.00 being owned by the Federal-American National Bank and Trust Company. The Edson W. Briggs Company subsequently defaulted both trusts and the American Company instituted foreclosure proceedings and on October 14, 1932, the American Company and the Federal-American National Bank and Trust Company caused to be organized a corporation under the laws of the State of Delaware known as the Rock Creek Park Estates, Inc., the corporation having the following capital structure:

2,000 shares preferred stock, par value $100.00 each
2,000 shares common stock, no par value.

The claims of the American Company and the bank were settled as of November 9, 1932 at which time the amount due the American Company was $154,960.97 and the amount claimed by the bank being $90,520.91.

The Rock Creek Park Estates, Inc. then issued 1,550 shares of its preferred stock to the American Company in payment for its first lien on the property, retaining 450 shares of the preferred stock in its treasury. The corporation also issued 2,000 shares of no par common stock to the bank in exchange for its junior lien on the same property. The corporation operated for a period of about two years and sustained substantial loss. It was, therefore, unable to pay preferred accumulated dividends and in September of 1935 the corporation was reorganized on the following basis.

The preferred stock was retired by executing and delivering to the American Company a first deed of trust secured by all of the property in the sum of $181,272.50, note being dated September 6, 1935, payable on or before five years after date with interest at the rate of 6% per annum. The common stock was placed in a voting trust, the trustees being instructed to elect to the Board of Directors each year two representatives who were to be nominated by the American Company and two to be nominated by this receivership.

The above information is furnished you only that you may have a complete picture of how this corporation was formed and also the interest that this Receivership has in it which is complete ownership as evidenced by the 2,000 shares of common stock held in the assets of this trust.

It is my understanding that the Federal Government can collect no taxes against an insolvent or bankrupt bank until the depositors have been paid in full. The Act of March 1, 1879 was amended by Section 818 of the Revenue Act of 1938. These provisions are now incorporated in Section 3798 of the Internal Revenue Code, passed in February of the present year. Section 3798 (c) of the Internal Revenue Code was amended by the Revenue Act of 1939, paragraph (b) of which I believe applies to this case and reads as follows:

"The term 'agent' as used in 3798 (b) of the Internal Revenue Code shall be deemed to include a corporation acting as a liquidating agent."

One of the late cases which I find most applicable to this case is that of U. S. *v.* Sterling, 106 Fed. (2d) 178 decided in the Fourth Circuit, August 28th of the present year. In this case the judgment of the District Court was affirmed, but without prejudice to the Government "to assess and collect the tax when funds are available after the claims of the bank's depositors have been satisfied."

It is therefore my belief that inasmuch as I am holding as Receiver of the Federal-American National Bank and Trust Company, the 2,000 shares of stock of the Rock Creek Park Estates, Inc., that this is one of the assets of the insolvent bank in Receivership and, as the depositors have not been paid in full that the Rock Creek Park Estates, Inc. should not be subject to any assessment of income tax.

I shall therefore, appreciate it if you will give the above information careful consideration and if necessary, I request an opportunity for a hearing in your office prior to your levying any deficiency against the subject corporation.

Very truly yours,

FREDERICK J. YOUNG,
Receiver.

APPENDIX C.

TREASURY DEPARTMENT

Bureau of Internal Revenue
Atlantic Division, Technical Staff
3501 Internal Revenue Building
Washington, D. C.

August 21, 1941.

Office of Commissioner of Internal Revenue

Address reply to Head, Atlantic Division, Technical Staff and refer to C:TS:AD. PFC: ARM:LMD

Rock Creek Park Estates, Inc.,
% The American Company
807 15th Street, N. W.
Washington, D. C.

SIRS:

Reference is made to your claim for refund of income taxes of $1,090.79 for 1936 and $129.21 for 1937.

The basis of your claim is that the corporation is exempt from income tax under 12 U. S. C. A. 570.

Your contention that the corporation is exempt from income tax is conceded on behalf of the Commissioner of Internal Revenue.

The overassessments in tax shown in the attached statement will be made the subject of certificates of overassessment which will reach you through the Collector of Internal Revenue for your district.

Respectfully,

(Signed) G. W. FRIDT,
Acting Head, Atlantic Division,
Technical Staff.

Enclosure: Audit statement.

Statement.

C:TS:AD.
PFC:ARM:LMD.

In Re: Rock Creek Park Estates, Inc., % The American Company, 807 15th Street N. W., Washington, D. C.

Income Tax Liability for the Year 1936-1937.

Year	*Liability*	*Assessed*	*Overassessment*
1936	None	$1,090.79	$1,090.79
1937	None	129.21	129.21
Total	None	$1,220.00	$1,220.00

The conclusion of the Atlantic Division of the Technical Staff, claims for refund, and Internal Revenue Agent's report dated November 20, 1939, have been made the basis of the adjustments in this statement.

Rock Creek Park Estates, Inc. Year ended December 31, 1936

Schedule 1.

No change has been made in net income, however it has been conceded that the corporation is exempt from income tax.

Tax Assessed, Account #402407	$1,090.79
Tax Liability	None
Overassessment	1,090.79

The Portion of the above overassessment representing an overpayment, if any, will be refunded or credited under the provision of Section 322 of the Revenue Act of 1936.

Year ended December 31, 1937

Schedule 2.

See Explanation in Schedule 1

Tax Assessed, Account #401237	$129.21
Tax Liability	None
Overassessment	$129.21

The portion of the above overassessment representing an overpayment, if any, will be refunded or credited under the provisions of Section 322 of the Revenue Act of 1936.

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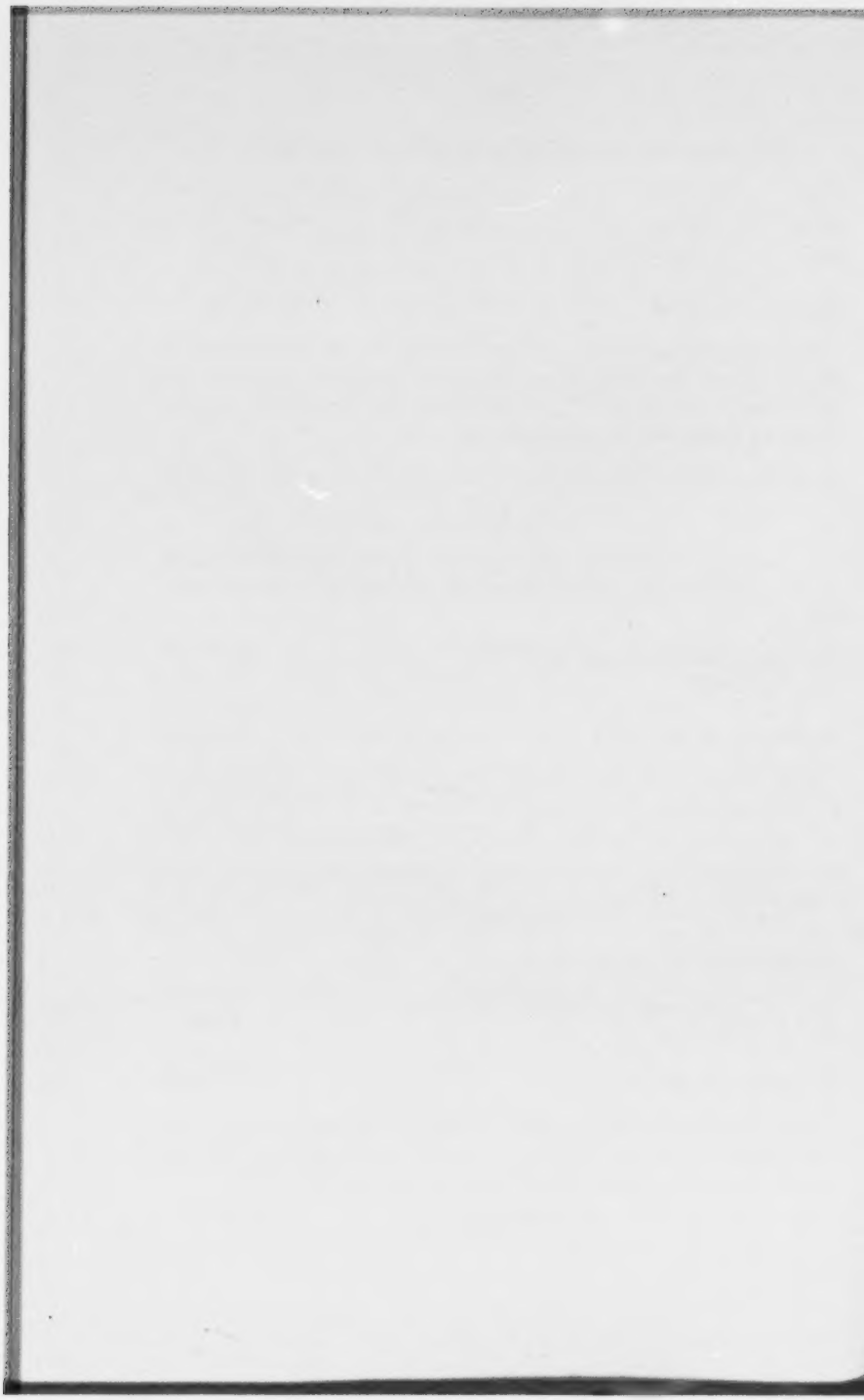

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Office - Supreme Court, U. S.
FILED
OCT 10 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 616

JUSTUS S. WARDELL, Receiver, District National Bank of Washington,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

Brief of Respondent in Opposition to the Petition for Writ of Certiorari

RICHMOND B. KEECH,
Corporation Counsel, D. C.,
VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,
GLENN SIMMON,
Assistant Corporation Counsel, D. C.,
Attorneys for the Respondent.

CENTRAL DUPLICATING DIVISION—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 616

JUSTUS S. WARDELL, Receiver, District National Bank of Washington,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

Brief of Respondent in Opposition to the Petition for Writ of Certiorari

SUMMARY OF ARGUMENT

1. The District of Columbia business privilege tax law was enacted only for the fiscal years ended June 30, 1938, and June 30, 1939, and expired on the latter date by specific limitation. Questions arising under laws which have expired or have been repealed are not of sufficient public importance to require the consideration of this Court.

2. The decision of the Court of Appeals is correct. All persons, including receivers, engaged in any business or commercial activity in the District were subject to the provisions of the District of Columbia business privilege tax law. During the tax years

here involved the petitioner was engaged in the business of operating apartment houses and an office building in the District of Columbia and is clearly liable for the tax measured upon receipts derived from such business.

The provisions of Section 570, Title 12, U.S.C.A., are not applicable to taxes due the District of Columbia. However, assuming that Section 570 does apply to District of Columbia taxes, it would not operate to abate the business privilege taxes here in question for two reasons: (a) it is the purpose of Section 570 to relieve the depositors and customers of an insolvent national bank of taxes which have been assessed or have accrued against the stockholders or owners of any such bank; nowhere is there indicated any intention to relieve the depositors or customers of taxes assessed or accrued against the receiver while he is engaging in business for the benefit and profit of such depositors; (b) payment of the business privilege taxes here involved would not diminish the assets of the insolvent District National Bank.

The decision of the Court of Appeals is not in conflict with any of its own decisions, or with any decision of any circuit court of appeals, or with any decision of this court.

ARGUMENT

I

The statute here involved has expired, and questions arising thereunder are not of sufficient public importance to require the consideration of this Court.

Title VI of the District of Columbia Revenue Act of 1937 imposed a business privilege tax for the fiscal year 1937-1938 (50 Stat. 690), Sec. 970, Title 20, D. C. Code, 1929, Supplement III. The act of May 16, 1938, to amend the District of Columbia Revenue Act of 1937, reenacted Title VI, and specifically provided in Section 16 thereof that the title should

expire June 30, 1939 (52 Stat. 369), Sec. 970o., Title 20, D. C. Code, 1929, Supplement V.

Questions arising under acts which have expired or have been repealed are not of sufficient public importance to require the consideration of this Court. *District of Columbia* v. *James J. Sweeney*, 310 U.S. 631.

II

The decision of the court below is correct.

(a) Petitioner was "engaging in business" in the District of Columbia within the meaning of the business privilege tax law.

No contention is made that the District National Bank was engaged in business during the periods here in question or that the receiver was engaged in the banking business. However, during the periods for which the business privilege tax law was applicable the receiver operated several apartment houses and an office building in the District, in connection with which operation heat, light, janitor, elevator, and other services were furnished. The rental of apartment houses and office buildings in connection with which such services are furnished is "business". *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 55 L. Ed. 389; *Von Baumbach* v. *Sargent Land Co.*, 242 U.S. 503, 61 L. Ed. 460. Thus, the business privilege tax for the fiscal year ended June 30, 1938, was measured upon only the rentals from apartments and office buildings in connection with which the receiver furnished such services. The renting of real estate and the renting of real and personal property is specifically designated as "business" by Section 1(e) of Title VI—Tax on Privilege of Doing Business—District of Columbia Revenue Act of 1937, as amended by the act approved May 16, 1938, 52 Stat. 363 (pet's. app. 38). Thus, the business privilege tax for the fiscal year ended June 30, 1939, was meas-

ured upon the receipts of the receiver from all rental of real estate.

The receiver is doing more than "merely liquidating the assets" of the insolvent District National Bank. He is engaging in the business of operating apartment houses and office buildings. Under the business privilege tax law, the operation of apartment houses and office buildings is "business", just as the operation of a grocery store or a gasoline service station is business. The petitioner, however, argues that because he is a receiver of an insolvent national bank he alone should be placed in a favored position and be permitted to engage in business in competition with other persons operating similar businesses without paying the taxes specifically imposed upon the operation of such business.

Although it is immaterial whether profit actually results [1], petitioner did derive a profit from the operation of the business during the taxable periods.

(b) The business privilege taxes here involved are not abated by Section 570, Title 12, U.S.C.A.

In the fifth defense in his answer to the amended complaint (R. 25), the petitioner alleges that any tax assessed against and collected from the District National Bank of Washington, or from the petitioner as receiver of such bank, will diminish the assets of said bank necessary for the full payment of all of the depositors of the said District National Bank, and contends that the business privilege taxes assessed against the petitioner are abated under the provisions of Section 570, Title 12, U. S. C. A. (pet's. app. 23).

Section 570 confers an exemption from national taxation only, and has no application to taxes collected by the District of Columbia [2]. The Treasury Department, in its letter of in-

[1] *Doggett* v. *Burnet*, 62 App. D.C. 103, 65 F. (2d) 191.
[2] *People* v. *Loughman* (CCA-2 1938), 100 F. (2d) 387, 389.

structions No. 4 to receivers of insolvent banks (revised to January 2, 1931), apparently considered the section applicable only to Federal taxes (see Appendix A). The language of the section clearly indicates an intention to make the provisions thereof applicable only to taxes assessed by the United States. The section applies only to taxes assessed or collected, or paid into the Treasury of the United States, and only the Commissioner of Internal Revenue is authorized to remit such taxes as are found to affect the claims of depositors of insolvent banks.

Petitioner's argument that the District of Columbia is a federal agency and that laws enacted for the District of Columbia are federal statutes reveals a lack of understanding of the relation between the two governments, and is directly opposed to decisions of this Court and of the United States Court of Appeals for the District of Columbia [3]. In the *Metropolitan Railroad* case [3] this Court rejected the argument that the Government of the District of Columbia is a department of the United States Government and held it to be a municipal corporation. In the *Maryland & Virginia Milk Producers'* case [3] the Court of Appeals held that Section 3224 R.S., which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," was intended to apply only to suits to restrain the assessment and collection of taxes levied by the United States, and was, therefore, inapplicable to District taxes. The Court of Appeals pointed out that District taxes are assessed by municipal authorities to defray the expenses of the District of Columbia and do not become a part of the general revenues of the United States.

However, even if Section 570 was applicable to taxes collected by the District of Columbia, and did relieve the depositors of payment of certain taxes assessed against the former

[3] *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U.S. 1; *Maryland & Virginia Milk Producers' Assn.* v. *Hazen*, 66 App. D.C. 136, 85 F. (2d) 302.

owners of a bank, it does not follow that the receiver would be exempt from payment of taxes for privileges exercised for the benefit of the depositors themselves.

It is the purpose of Section 570 to relieve the depositors and customers of an insolvent national bank of taxes which have been assessed or have accrued against the stockholders or owners of the bank. This limited purpose is clearly stated in the two Court of Claims decisions construing the statute (*Johnston* v. *United States*, 17 C. Cls. 157; *Jackson* v. *United States*, 20 C. Cls. 298). In the *Jackson* case it is stated (p. 304):

> "It was clearly the intention of the statute to relieve the innocent customers of the bank, *between whom and the government there were no relations of tax-payer and tax-receiver*, and not to relieve the owners of the institution from their just liabilities." (Italics added.)

The business privilege taxes here involved are unlike the taxes considered in the two Court of Claims cases, *supra*, and by the United States Court of Appeals for the District of Columbia in the case of *Hazen* v. *Hardee* [4]. The taxes here in question did not accrue against the stockholders or owners of the District National Bank but are expenses incurred by the receiver while engaging in business for the benefit of the depositors.

It was clearly the intention of Section 570 to relieve depositors of national banks

> "from the payment of certain taxes, not assessed upon them, but upon the banks of which they are only customers; taxes which, under the pre-existing law, they would indirectly be obliged to pay when a bank is so insolvent that all its capital is gone and it

[4] 78 F. (2d) 230, 64 App. D.C. 346.

has nothing left with which to pay taxes, except the money of its depositors." *Johnston* v. *United States*, *supra*, wherein the court further said (p. 172), with respect to the purpose of the section:

> "These semi-annual taxes are assessed against national banks in their corporate capacity, upon their capital and business, in consideration of the franchise and benefits which the government grants to them, and for other reasons. They are expected to come out of the profits of the bank, and thus reducing the dividends of the stockholders, they are a tax upon the proprietors of the institutions. It was never intended thus to tax the customers and creditors of the banks. When, therefore, it was found that in case of insolvency of the bank and the loss of its entire capital, and its inability to pay its depositors in full from all its assets, an enforcement of the taxes would result in the taxation of the depositors, the customers and creditors of the bank, this act to relieve them was passed."

The language of Section 570, its legislative history and the interpretation placed upon the section by the Court of Claims clearly show that its purpose is to relieve the depositors of taxes not assessed upon them but upon the proprietors of the bank while it was operating as such. Nowhere does there appear any intention to relieve depositors of taxes which might legally be imposed upon the use of the assets for their own benefit.

In pargraph 4 of the second defense in his answer to the amended complaint (R. 23), petitioner admits that during the calendar year 1936 he received and derived a net profit from the operation of apartment houses and an office building in the District, which net profit was in excess of the business privilege taxes claimed and interest and penalties accrued

thereon, and in paragraph 7 of the second defense in his answer to the amended complaint (R. 24), he admits that during the calendar year 1937 he received and derived net profit from the rental of real estate and the operation of apartment houses and an office building, which net profit was in excess of the business privilege taxes claimed and interest and penalties accrued thereon. It therefore seems plain that payment of the business privilege taxes here involved will not diminish the assets of the District National Bank.

The business of operating apartment houses and office buildings and renting real property is conducted by the petitioner for the benefit of depositors of the District National Bank and business privilege taxes imposed thereon are merely an expense in connection with such business, and, while such taxes may diminish the profits derived from the business, they do not diminish the assets any more than any other expenses such as fuel, light, repairs, janitor, or other services in connection with the operation of a building. The argument that the receiver should be exempt from payment of the business privilege taxes here in question is no more sound or logical than the argument that expenses incurred on account of fuel, light, repairs, janitor, or other services furnished the apartment and office buildings operated by the receiver are not obligations of the receiver or the depositors, and should not be paid until after the depositors have received one hundred per cent of their claims. It cannot reasonably be contended that Congress intended to permit receivers of national banks to compete in business with other persons without being subject to similar taxes. Certainly no such discriminatory intention appears in the law.

Thus, assuming that Section 570 is applicable to the District of Columbia, it would not operate to abate the business privilege taxes here involved for the reason that such taxes are expenses of receivership and a liability of the depositors (as contrasted with debts of the stockholders), and payment

thereof will not diminish the assets of the District National Bank.

(c) Petitioner is not exempted from payment of the tax by the provisions of Section 6 of the business privilege tax act.

Petitioner points out that Section 6 of Title VI (pet's. app. 27), as originally enacted and as amended, exempts national banks which pay taxes under existing laws of the District upon gross earnings from the provisions of the title, and argues that such exemption necessarily applies to receivers of insolvent national banks engaging in separate and independent businesses.

The receiver is not a national bank, nor has he or the District National Bank paid any taxes to the District of Columbia upon any gross earnings for the years here in question. The provisions of Section 6 are applicable only to operating national banks, and the exemption applies only in cases where taxes on the gross earnings of such banks are paid to the District of Columbia under some other statute. No contention is made that the gross receipts here in question have been taxed, or are subject to tax, under any other existing law.

(d) The decision of the Court of Appeals is not in conflict with any of its own decisions or with any decision of any circuit court of appeals or with any decision of this Court.

As the fifth and sixth reasons relied on for allowance of the writ of certiorari, petitioner states that the Court of Appeals "has not given proper effect to applicable decisions of this Court" and that its decision "appears to be in conflict with its own decisions and with the decisions of other circuit courts of appeal". Petitioner's brief, however, fails to point out in what respect, if any, the decision of the Court of Appeals in the case at bar is in conflict with any other decision.

Apparently, the question of whether Section 570, Title 12, U. S. C. A., is limited in its operation to national taxation has been presented in only one other case [5] which was decided in 1938 by the Circuit Court of Appeals for the Second Circuit, and which decision is in accord with the decision in the instant case. Respondent has found no decision in conflict with that of the Court of Appeals in the cause at bar.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys for the Respondent.

[5] *People* v. *Loughman*, 100 F. (2d) 387, 389.

APPENDIX A

[SEAL]

COMPTROLLER OF THE CURRENCY
ADDRESS REPLY TO
"COMPTROLLER OF THE CURRENCY"

TREASURY DEPARTMENT
WASHINGTON

LETTER OF INSTRUCTIONS NO. 4
(Revised January 2, 1931)

SUBJECT—TAXES SOUGHT TO BE COLLECTED FROM THE RECEIVER OF AN INSOLVENT NATIONAL BANK OR THE ASSETS IN HIS HANDS.

For the reasons hereinafter stated, no tax is collectible from the receiver of an insolvent national bank, or from the assets in his hands except taxes assessed against the real property owned by the bank.

TAXES OF ANY CHARACTER ASSESSED BY THE UNITED STATES GOVERNMENT

All Federal taxes of every character are abated when a national bank becomes insolvent where the payment thereof would diminish the assets necessary for the payment of depositors in full. This abatement is provided for by Section 570, Title 12, United States Code, which reads:

"Insolvent banks as exempt from tax. Whenever and after any bank has ceased to do business by rea-

son of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States, on account of such bank, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall so appear to him, is authorized to remit so much of said tax against insolvent State and savings banks as shall be found to affect the claims of their depositors. (Mar. 1, 1879, c. 125, Par. 22, 20, Stat. 351; Mar. 3, 1883, c. 121, Par. 1, 22 Stat. 488)."

The above section is construed in Jackson vs. U. S., 20 Ct. Cl. 298 and Johnston vs. U. S., 17 Ct. Cl. 158. Where a demand is made upon the receiver to pay a Federal tax, or to file a return, and the payment of the tax would diminish the assets necessary to pay depositors in full, an affidavit to this effect should be executed by the receiver and forwarded to the Collector of Internal Revenue, inviting attention to the above act of Congress. This procedure should close the matter and if any difficulty is experienced, a complete statement of the facts should be forwarded to the Comptroller.

TAXES LEVIED BY THE STATES OR POLITICAL SUBDIVISIONS THEREOF

National banking associations being creatures of the Federal Government can be taxed by the state or its political subdivisions only as permitted by Congress. The full measure of the power of the state or its political subdivisions to tax such associations is prescribed by Section 548, Title 12, United States Code, and a full list of cases discussing the extent of taxation permitted may be found in the United States Code Annotated, following the section referred to. As receivers are

concerned with the effect of the provisions of this section upon the assets of the bank in their hands, our discussion will be limited accordingly.

Taxes assessed against the personal property owned by the bank whether levied prior to or subsequent to suspension are void, hence uncollectible. Owensboro National Bank vs. Owensboro, 173 U.S. 664. Although Congress by the provisions of Section 548, above referred to, has permitted the state authority to assess taxes imposed on the capital stock of the bank against the bank as agent (Merchants Bank vs. Pennsylvania, 167 U.S. 461), this right is cancelled by the bank's insolvency. Where a national bank is insolvent and has passed into the hands of a receiver, a tax assessed against the shares of the bank, to the bank as agent, cannot be collected from the receiver or from the assets in his hands. City of Boston vs. Beal, 51 Fed. 306; Brown vs. French, 80 Fed. 166; Stapylton vs. Thaggard, 91 Fed. 93. It thus appearing that personal property taxes of any character levied prior to or subsequent to suspension and any capital stock taxes assessed to the bank as agent are uncollectible from the receiver or from the assets in his hands, it follows that the only taxes collectible from the receiver are those levied against the real estate owned by the trust, Section 548, above referred to, providing: "Nothing herein shall be construed to exempt the real property of associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real estate is taxed."

The Federal authorities control these questions because of your right as receiver to have any action seeking to collect taxes, other than real estate taxes, adjudicated in that court, independent of the amount involved, as suits to wind up the affairs of a national bank. See Studebaker Corporation of America vs. First National Bank of Florence, 10 Fed. (2d) 590, and Larrabie Flour Mills vs. First National Bank of Henryetta, 13 Fed. (2d) 330. That the state courts of officers are power-

less to interfere in any way with the administration of yo
trust in this connection is clear from the following excer
from the decision of the Supreme Court of the United Stat
in Earle vs. Commonwealth of Pennsylvania, 178 U.S. 44
454:

> "We must not, however, be understood as holding that the distribution of the bank's assets in the hands of the receiver—could have been in anywise directly controlled by the state court or seized under an attachment or execution in the hands of any state officer. On the contrary, the direction in the statute that the receiver pay over all moneys realized by him from the assets of the bank to the Treasurer of the United States, subject to the order of the Comptroller, furnished a rule of conduct for him which neither an order of nor any proceedings in the state court could affect, modify or change. The scheme of the statute relating to suspended national banks is that from the time of a bank's suspension all its assets, of whatever kind, as they are at the time of suspension, pass in the first instance to the receiver, the proceeds thereof to be distributed by the Comptroller among those whose claims are proved to his satisfaction or are adjudicated by some court of competent jurisdiction. So when the Chestnut Street National Bank suspended and went into the hands of a receiver, the entire control and administration of its assets were committed to the receiver and the Comptroller, subject, however, to any right of priority previously acquired by the plaintiff through the proceedings in the suit against Long."

Where county or other taxing officials acting under state
authority seek to collect taxes other than taxes levied against
the trust's real estate, every effort should be made to con-

vince them that such taxes are uncollectible. Ordinarily, a presentation of this letter to the county attorney should convince him that the taxes other than real estate taxes are uncollectible. If, for any reason, the county officials do not concur in the views set out herein, we would be pleased to consider their views to the contrary.

Yours very truly,
J. E. FOUTS, *Supervising Receiver,*
Division of Insolvent National Banks